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No. 1308

In the Supreme Court of the United States

OCTOBER TERM, 1968

EDWARD DON & COMPANY, a corporation, IRENE K. DON, RICHARD DON and DANIEL DON,

Petitioners,

vs.

PEARL DON UFLAND, DAVID DON, JULIUS K. DON, SAM DON and MEYER DON,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
135 S. LaSalle Street
Chicago, Illinois 60603

JACK A. COHON
134 N. LaSalle Street
Chicago, Illinois 60602
Attorneys for Respondents

Of Counsel:
JENNER & BLOCK
135 S. LaSalle Street
Chicago, Illinois 60603

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Opinions Below

The opinion of the Appellate Court of Illinois, First District, is reported at 98 Ill. App. 2d 49, 240 N.E. 2d 725.

The opinion of the trial judge has not been reported. It appears in Volume 1 of the printed Abstract of Record, pages 320 to 456.

Jurisdiction

The judgment of the Appellate Court of Illinois, First District, was entered on September 11, 1968. (R. 56-57.) Petitioners' petition for rehearing was denied by the Appellate Court on October 18, 1968. (R. 57-58.) On January 27, 1969, the Supreme Court of Illinois denied peti-

tioners' petition for appeal as a matter of right and the alternative petition for leave to appeal. The petition for writ of certiorari was filed in this Court on April 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

Did the Illinois Appellate Court decide the case in accordance with the powers granted to it by Illinois Supreme Court Rule 366(a)(5)?

Did the action of the Illinois Appellate Court violate petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

Statement

This case involves a dispute among members of a Chicago family over the ownership of a family corporate business (Edward Don & Company). The plaintiffs-petitioners are the widow and sons of Edward Don, the founder of the business. They claimed that they owned 62% of the stock of the corporation, that the defendants-respondents (four brothers and a sister of Edward Don, who have been in the business since the 1920's) owned 35% of the stock, and that 3% was owned by certain collateral relatives. The defendants-respondents, on the other hand, contended that the stock of the corporation was owned by a partnership consisting of Edward Don and the defendants.

The trial of the issues consumed 97 trial days. The record consists of 10 printed volumes made up of 462 printed pages of pleadings, orders and the chancellor's opinion; 2,676 printed pages of testimony, argument and colloquy; and three printed volumes of exhibits containing 1,088 pages. After hearing extended oral arguments (6 A. 2648-7 A. 3018), the chancellor took the matter under

advisement for five and one-half months (January 18-June 7, 1963), during which time he prepared a lengthy opinion (1 A. 319-456) in which he thoroughly analyzed the parties' arguments and the evidence. The opinion and final decree were entered on June 17, 1964, after the chancellor had heard long arguments on petitioners' objections to the proposed findings.

The Appellate Court received five printed briefs containing 529 pages. That court had the case under advisement for 14 months. Its opinion ontains a studious review of the contentions and the proof. While the Appellate Court accepted most of the chancellor's conclusions of fact and law, in certain respects the court differed from the chancellor's ultimate findings, and revised the decree accordingly. The Appellate Court remanded the case to the chancellor to take further evidence in order to determine the parties' exact interest in the stock which is the subject matter of this suit, thus obviating the need for another separate action to determine those interests.

Petitioners thereupon filed an application to the Supreme Court of Illinois for leave to appeal. They contended that they were entitled to an appeal as a matter of right under the provisions of the rules of the Supreme Court of Illinois which are applicable in cases in which a constitutional question arises for the first time in and as a result of the action of the Appellate Court. In their brief, respondents pointed out to the Supreme Court of Illinois that no new issues were raised or ruled upon by the Appellate Court, but rather the Appellate Court simply arrived at certain conclusions of fact and law different from the chancellor's, and different from those advanced by the parties, but *all within the issues presented by the parties.*

The Supreme Court of Illinois denied petitioners' petition for appeal as a matter of right as well as their petition for leave to appeal.

ARGUMENT

The basic fallacy which pervades the petition for writ of certiorari is the argument that the Appellate Court of Illinois injected new issues into the case. The Appellate Court did not inject new issues into the case. It ruled upon the issues which were squarely presented by the parties in both the trial and the Appellate Court, and which had been briefed extensively by the parties in both courts.

It is true that on certain issues the Appellate Court arrived at conclusions of law and fact different from those of the chancellor, and different from those contended for by the parties, but in every case the Appellate Court's rulings were within the issues presented by the parties.

Rule 366 (a)(5) of the Rules of the Supreme Court of Illinois authorizes reviewing courts to "give any judgment and make any order that ought to have been given or made . . . and grant any relief . . . that the case may require."

It is significant, moreover, that in the only two material respects in which the Appellate Court differed from the chancellor, the Appellate Court's ruling was favorable to the *petitioners*.

(1)

The basic issue framed by the pleadings and tried by the chancellor was: Which certificates of stock of Edward Don & Company are valid and represent ownership of the corporation?

Petitioners contended that ownership is reflected in certificates 1 through 106 and 108 through 114, and that certificated 0 and 107 are no longer viable.

Respondents contended that certificates 0 and 107 reflect ownership by the partnership, and that the other certificates (1-106 and 108-114) are sham and of no effect.

The chancellor accepted respondents' contention, and held that certificates 0 and 107 reflect ownership of the corporation in the partnership, which he found consisted of respondents and Edward Don at the time of Edward's death in 1956. (1 A. 315, par. 12.)

The chancellor made no findings as to the respective interests of the partners in the partnership at the time of Edward's death or at any other time, nor did he make any provision for receiving further proof on this issue, although respondents had requested, both in pleading and argument, that he do so.

The Appellate Court did not fully accept the contentions of either side, nor all the conclusions of the chancellor:

(1) The Appellate Court agreed with the chancellor and respondents that the 1952 division of certificate 0 was not intended to and did not accurately reflect the partners' interest either in the partnership or in the 500,000 shares of stock represented by certificate 0 which was divided into certificates 1-6. The Appellate Court held, as had the chancellor, that the record "clearly establishes" that certificates 1 to 6 were "certificates of convenience" and "a showcase." (98 Ill. App. 2d at 64, 240 N.E. 2d at 734.) The Appellate Court said (98 Ill. App. 2d at 61, 240 N.E. 2d at 732):

> " . . . this record thoroughly establishes that certificates 1-6 were never intended to reflect the true and precise ownership of the corporate assets."

(2) Whereas respondents contended and the chancellor held that the division of certificate 0 into certificates 1 to 6 was a nullity, the Appellate Court held, as *petitioners* contended, that this division was intended to and did transfer ownership of the corporate stock from the partnership to the partners. But (contrary to the petitioners' argument) the Appellate Court held that certificates 1 through 6 did not reflect the actual interest of the partners in the corporation's stock (98 Ill. App. 2d at 68, 70 and 71, 240 N.E. 2d at 735 and 737):

> " . . . We do not agree with the trial court that Certificates 1-6 were a sham or a complete nullity. Rather they were certificates issued for a specific purpose to meet a specific situation and are valid to the extent that they effectively accomplished that purpose.
>
> * * *
>
> " . . . the Chancellor elected to treat them [certificates 1 to 6] and their progeny as still-born. We do not deem this necessary. We prefer to regard them as valid to the extent that they knowingly transferred actual interest in the corporate assets.
>
> * * *
>
> ". . . To the extent, therefore, that each certificate represented the actual percentage-wise share of each of the partners in the partnership, it was a valid conveyance and likewise the progeny of each certificate is valid to that extent and to that extent only. . . . "

(3) The Appellate Court held, as had the chancellor, that certificates 109 to 114 (purportedly dividing certificate 107 held by the partnership) were ineffective, and certificate 107 is still owned by the partnership (98 Ill. App. 2d at 67, 240 N.E.2d at 735.)

(4) Just as the chancellor had made no findings as to the respective interest of the partners in the partnership, the Appellate Court made no determination as to

the "true and precise ownership of the corporate assets." Rather, the court remanded the case to the chancellor for further hearings on that subject. (98 Ill. App. 2d at 71-2, 240 N.E. 2d at 737):

> " . . . The Chancellor could not and neither can we from the records before us determine with precision the proper individual interest in the corporation and an accounting for that purpose is necessarily required in accordance with sound general accounting principles. . . . "

The Appellate Court's remandment order provides (98 Ill. App. 2d at 73-4, 240 N.E. 2d at 738):

> "V. That the percentage interest of each of the partners in the physical assets transferred to the corporation in consideration of Certificate O and Certificate 107 be determined as of the time of the respective transfers, . . .
>
> "VI. That Certificate zero and Certificate 107 be surrendered and in lieu thereof new certificates be issued to the partners properly reflecting their respective percentagewise ownership of the corporate assets; . . . "

(2)

As stated above, the ultimate issue litigated and briefed by the parties was — which certificates of stock are valid and represent ownership of the corporation?

That is *precisely* the issue decided by the Appellate Court. While petitioners assert that they have been deprived of an opportunity to present evidence on the so-called "trusteeship" issue, they have been fully heard on the issue of stock ownership.

The "trusteeship" issue of which petitioners make so much does not really exist. Petitioners contended in the trial court and in the Appellate Court that certificates 1 to 6 constituted a valid transfer of title to the 500,000

shares represented by certificate 0 from the partnership to the individual members of the partnership. The Appellate Court *upheld* this contention, contrary to respondents' arguments and contrary to the chancellor's conclusions.

The only really new matter in the case is the Appellate Court's holding that certificates 1 to 6 do not represent the actual percentage interests of the partners of the partnership.

This conclusion was well within the issues tried and argued by the parties; it relates directly to the basic difference between the parties as to the effect of the 1952 division of certificate O. With two exceptions, the Appellate Court's ruling as to the 1952 division of certificate O into Nos. 1 to 6 has the same legal effect as the chancellor's holding that certificates 1 to 6 are sham and that the partnership still owns the stock. Under either view, further hearings are necessary to determine what the partners' respective interests were in the partnership. The two differences are:

First, under the chancellor's ruling, the determination of the partners' interests in the 500,000 shares represented by certificate O would be made as of February 11, 1956, when the partnership was dissolved by operation of law upon the death of Edward Don, whereas under the Appellate Court's ruling the determination of partners' interests in the 500,000 shares will be made as of the time of the division of certificate O into certificates 1 to 6 in 1952.

This difference presents no new issue. Rather, it is a difference in legal result flowing from the Appellate Court's holding (contrary to the chancellor's holding and to respondents' contention) that the 1952 division of certificate

O effectively transferred ownership of the 500,000 shares from the partnership to the partners.

Second, because of the chancellor's holding that certificate O was owned by the partnership on Edward Don's death, petitioners argued to the Appellate Court (but not to the chancellor) that certain collateral relatives were indispensable parties, and that the decree must be reversed because they are not parties to the case. This argument was dissipated by the Appellate Court's ruling that certificates 1 to 6 are valid insofar as they represented the partners' interests in the partnership at the time certificate O was divided into certificates 1 to 6, because the collateral relatives' names appear in certificates which were subdivisions of certificates 1 to 6. Since the collateral relatives' names appear in only 12% of the certificates,* the Appellate Court's ruling has the effect of validating the relatives' certificates, so that they have obtained all of the relief they could have obtained had they been parties.

Accordingly, contrary to the erroneous contention of petitioners, the Appellate Court did not inject any new issue into the case, and to the extent the court differed from the chancellor the differences favored the *petitioners,* and were adjudications upon issues squarely presented to the courts below in the pleadings, by the evidence introduced by the parties and by their briefs.

(3)

The Constitution of the United States does not require state reviewing courts to choose between the legal theories and conclusions of the parties, or between the contentions

* Only 3.6% of the certificates are in the names of persons who are not spouses, children or children-in-law of the parties.

of the appellant and the conclusions of the trial court. So long as there is no fundamental alteration of the issues, the reviewing court is free, as the Appellate Court did in this case, to arrive at its own legal conclusions upon the facts presented, and "give any judgment and make any order that ought to have been given or made . . . and grant any relief . . . that the case may require." (Illinois Supreme Court Rule 366(a)(5).) Compare *Hux* v. *Raben,* 38 Ill. 2d 223 (1967).

In answer to a similar contention in *Walker* v. *Walker,* 369 Ill. 627 (1938), cert. denied 306 U.S. 657, wherein both parties claimed sole ownership of joint tenancy property but the court held the property should be divided equally between the parties, the Illinois Supreme Court said (369 Ill. at 631):

> " . . . Here, however, the complaint alleged appellee was sole owner of the property, and in her counterclaim appellant set up that she was sole owner. Thus the question of the ownership of the property was clearly put in issue, and the chancellor was warranted in adjudicating the rights of the parties in the property."

Here too the question of the ownership of property was in issue, and the Appellate Court was authorized to adjudicate that question.

The cases relied upon by petitioners, while stating sound principles, have no application to the case at bar.

In *Saunders* v. *Shaw,* 244 U.S. 317 (1917) (Petition pp. 8-9), the trial court excluded certain evidence which the Louisiana Supreme Court held should have been admitted. This Court held that the Louisiana Supreme Court could not reverse outright on the basis of the excluded evidence, but had to afford the other party an opportunity to introduce his proof on that subject. This case is inapposite

here because there was no evidence excluded in the trial court, there was no outright reversal by the Appellate Court, and petitioners were afforded a full opportunity to introduce their proof on the issue of stock ownership in the trial court.

Cole v. *Arkansas,* 333 U.S. 196 (1948) (Petition p. 9), holds that a conviction cannot be upheld on appeal on the ground that the defendant was proven guilty of a crime not charged or submitted to the jury.

Spevack v. *Klein,* 385 U.S. 511 (1967) (Petition pp. 9-10), was a disciplinary case involving an attorney who refused *(inter alia)* to produce records subpoenaed in a judicial proceeding. At the trial level, the parties agreed that the records were encompassed by the privilege against self-incrimination, and the issue was whether or not the attorney could be disbarred for asserting the privilege. The New York Court of Appeals affirmed an order of disbarment on the alternative ground that the records were *not* encompassed by the privilege because they were records required by law to be kept. This Court held that since the "required records" issue was not presented or litigated at trial, the attorney was entitled to introduce evidence that the records were not required to be kept. We have no quarrel with this holding. But it has no application here, since the parties were fully heard at trial on all issues determined by the Appellate Court.

This case is similar to *Butler Bros.* v. *McColgan,* 315 U.S. 501 (1942), a civil case tried in the California state court. The parties submitted the case on a stipulation of facts which provided that if "this stipulation fails to establish any fact necessary to a decision, the case shall be reopened for the taking of further proofs in respect thereof." On appeal from the trial court's decision, the

California Supreme Court stated that "appellant has not furnished any explanation of why its California business differs so from the average that the formula produced an erroneous result"; the court nevertheless went on to decide the case without remandment. In this Court, the appellant argued that the procedure followed by the California Supreme Court violated appellant's procedural due process rights. This Court said:

> "... Appellant now asserts that it has been denied procedural due process under the rule of *Saunders* v. *Shaw*, 244 U.S. 317. We do not agree. The Supreme Court of California created no innovation and sprung no surprise when it placed on appellant the burden of establishing that the formula taxed extraterritorial values. As we have noted, that is settled doctrine. Appellant had a full opportunity to be heard on the issues which it tendered."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
135 S. LaSalle Street
Chicago, Illinois 60603

JACK A. COHON
134 N. LaSalle Street
Chicago, Illinois 60602
Attorneys for Respondents

Of Counsel:
JENNER & BLOCK
135 S. LaSalle Street
Chicago, Illinois 60603

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